

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE GOOGLE INC. COOKIE
PLACEMENT CONSUMER PRIVACY
LITIGATION

C.A. 12-MD-2358 (SLR)

This Document Relates to:
All Actions

**CLASS PLAINTIFFS' INITIAL RESPONSE TO MOTIONS
OF MICHAEL FROHBURG, ANDY WU, DANIEL MAZZONE,
AND MICHELLE KUSWANTO TO INTERVENE IN THIS MDL**

Class Plaintiffs in this multidistrict litigation (“MDL”), through the undersigned interim class counsel appointed pursuant to Fed. R. Civ. P. 23(g)(3), file this partial response to the Motion by Michael Frohberg and Andy Wu for Intervention as Plaintiffs [D.I. 62] and Motion by Daniel Mazzone and Michelle Kuswanto for Intervention as Plaintiffs [D.I. 64] (collectively, the “Motions to Intervene”). Class Plaintiffs respectfully request that this Court defer further briefing, argument and decision on these two motions. Now scheduled briefing before the Judicial Panel on Multidistrict Litigation (“JPML”) may well – and we believe should – render the intervention motions moot.

The proposed intervenors are plaintiffs in two actions pending in the United States District Court for the Eastern District of New York. *See Mazzone v. Vibrant Media Inc.*, No. 12 Civ. 02672 (NGG) (JO) and *Frohberg v. Media Innovation Group, LLC*, No. 12-CV-2674 (WFK) (JO) (together, the “New York Actions”). On January 18, 2013, the day after the Motions to Intervene were filed with this Court, defendants in each of the New York Actions filed Notices

of Potential Tag-Along with the JPML, seeking to relate the New York Actions to this MDL and have the New York Actions transferred to this Court.

Five days after the Notice of Potential Tag-Along, on January 23, 2013, the JPML issued Conditional Transfer Order (“CTO-5”), see MDL No. 2358, Dkt. No. 81 (attached hereto as **Exhibit A**) which provides in part: “It appears that the action(s) on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the District of Delaware and assigned to Judge Robinson.” On January 29, 2013, the proposed intervenors filed a Notice of Opposition to CTO-5, see MDL No. 2358, Dkt. No. 83 (attached hereto as **Exhibit B**). The Clerk of the JPML has set a briefing schedule with the Motion to Vacate with Brief in Support due on or before February 12, 2013, and responses due on or before March 5, 2013. *See* MDL No. 2358, Dkt. No. 85.

Class Plaintiffs anticipate filing an interested party response to the motion to vacate CTO-5, contending that these actions should be transferred to this Court under 28 U.S.C. §1407. The New York Actions share many and fundamental common questions of fact and common allegations regarding defendants’ alleged improper setting of cookies on the plaintiffs’ Apple Safari internet browsers with the cases already transferred and consolidated into the MDL. The key facts underlying the allegations against the defendants in the New York Actions are precisely the same as those in the MDL: that each of these defendants placed cookies on plaintiffs’ web browsers that circumvented these plaintiffs’ browser settings that blocked such cookies during the period leading up to February 2012, and plaintiffs and the putative classes were therefore harmed because their statutory rights were violated and they suffered actual harm. The New York Actions should be transferred to be part of this MDL because the cases arise out of the same set of facts, raise claims against the same Defendants, and the objectives of JPML transfer

and consolidation will be achieved: elimination of duplicative discovery, avoidance of conflicting rulings and schedules, reduced litigation costs, and saved time and effort of the parties, the attorneys, the witnesses, and the courts.¹

The decision to add Vibrant Media, Inc., Media Innovation Group, LLC and WPP plc as defendants to the consolidated amended complaint was made by MDL-Court-Appointed Interim Class Counsel who are charged with prosecuting this MDL for the benefit of the putative Class. Denying transfer will defeat the important objectives of coordination and consolidation under 28 U.S.C. § 1407.

If the JPML issues a final transfer order and transfers the New York Actions to this Court, the Actions would be automatically consolidated with the MDL pursuant to paragraph 2 of this Court's Consolidation Order of July 27, 2012 ("All actions that have been or will be transferred to this Court by the JPML as tag-along actions to MDL No. 2358 shall be consolidated into this action for all pretrial purposes"). [D.I. 22] Under the terms of the Consolidation Order, any party objecting to consolidation at that point can file an application for relief within 10 days. *Id.*

In light of the current briefing in the JPML, the Class Plaintiffs submit that it would be premature and inefficient to consider the Motions to Intervene at this time. If the JPML were to transfer the New York Actions to the District of Delaware, the Motions to Intervene would be mooted in their entirety. Procedures already established in this Court's July 27, 2012 Consolidation Order protect any parties that object to consolidation. If instead the JPML decides against transfer, the Class Plaintiffs at that point would respectfully request to supplement this brief and address the substantive points raised in the Motions to Intervene.

¹ See *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968).

Therefore, until the JPML renders a decision on CTO-5, the Class Plaintiffs respectfully request that this Court defer briefing, argument and decision on the Motions to Intervene. Rather than burden the Court with premature and quite likely unnecessary briefing and argument, the undersigned believe judicial efficiency will be best served through discussion of a protocol for responding, if necessary, at the In-Person Status Conference scheduled for January 30, 2013.

Dated: January 29, 2013

Respectfully submitted,

KEEFE BARTELS, LLC

STRANGE & CARPENTER

/s/ Stephen G. Grygiel
Stephen G. Grygiel (Del Br No. 4944)
John E. Keefe, Jr.
Jennifer L. Harwood
170 Monmouth St.
Red Bank, NJ 07701
Tel: 732-224-9400
sgrygiel@keefbartels.com

/s/ Brian Russell Strange
Brian Russell Strange
Keith Butler
David Holop
12100 Wilshire Boulevard, Suite 1900
Los Angeles, CA 90025
Tel: 310-207-5055
laounsel@earthlink.net

Executive Committee Member

Executive Committee Member

**BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.**

STEWARTS LAW US LLP

/s/ James P. Frickleton
James P. Frickleton
Mary D. Winter
Stephen M. Gorny
Edward D. Robertson, Jr.
11150 Overbrook Road, Suite 200
Leawood, KS 66211
Tel: 913-266-2300
jimf@bflawfirm.com

/s/ David A. Straite
David A. Straite (Del Bar No. 5428)
Ralph N. Sianni (Del Bar No. 4151)
Michele S. Carino (Del Bar. No. 5576)
Lydia E. York (Del Bar No. 5584)
1105 North Market Street
Wilmington, DE 19801
Tel: 302-298-1200
dstraite@stewartslaw.com

Executive Committee Member

*Plaintiffs' Steering Committee Member and
Liaison Counsel*

**EICHEN, CRUTCHLOW, ZASLOW &
MCELROY LLP**

/s/ Barry Eichen

Barry R. Eichen
40 Ethel Road
Edison, NJ 08817
Tel: 732-777-0100
beichen@njadvocates.com

Plaintiffs' Steering Committee Member

MURPHY P.A.

/s/ William H. Murphy, Jr.

William H. Murphy, Jr.
One South Street, Suite 2300
Baltimore, MD 21202
Tel: 410-539-6500
billy.murphy@murphypa.com

Plaintiffs' Steering Committee Member

BRYANT LAW CENTER, PSC

/s/ Mark Bryant

Mark Bryant
601 Washington Street
P.O. Box 1876
Paducah, KY 42002-1876
Tel: 270-442-1422
mark.bryant@bryantpsc.com

*Counsel for Plaintiff William G. Gourley
and Plaintiffs' Steering Committee Member*

SEEGER WEISS LLP

/s/ Jonathan Shub

Jonathan Shub
1515 Market Street, Suite 1380
Philadelphia, PA 19102
Tel: 215-564-2300
jshub@seegerweiss.com

*Counsel for Plaintiff Lynne Krause and
Plaintiffs' Steering Committee Member*

BARNES & ASSOCIATES

/s/ Jay Barnes

Jay Barnes
219 East Dunklin Street
Jefferson City, MO 65101
Tel: 573-634-8884
Jaybarnes5@gmail.com

Plaintiffs' Steering Committee Member